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COMPREHENSIVE EXAMINATION OF THEMATIC ISSUES RELATING TO THE ELIMINATION OF RACIAL DISCRIMINATION

The rights of non-citizens

Working paper submitted by Mr. David Weissbrodt 1/
in accordance with Sub-Commission decision 1998/103

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Introduction

1. At its fiftieth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in resolution 1998/103, decided "to entrust Mr. David Weissbrodt with the preparation, without financial implications, of a working paper on the rights of persons who are not citizens of the country in which they live, ... in order to enable it to take a decision at its fifty-first session on the feasibility of a study on that subject." The present working paper was prepared to comply with that mandate, assist the Sub-Commission in considering whether a full study of the topic should be undertaken, and respond to a request from the Committee on the Elimination of Racial Discrimination.

2. This working paper first reviews the background to the Sub-Commission's decision to pursue the topic of the rights of persons who are not citizens of the country in which they live, that is, non-citizens. Second, the working paper examines the rights of non-citizens under the International Convention on the Elimination of All Forms of Racial Discrimination. Third, it considers other standards relevant to non-citizens: the Charter of the United Nations; the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the 1985 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

3. Fourth, the working paper looks at the development of the rights of non-citizens since 1985 including global developments, particularly in the context of the United Nations; regional developments, particularly in Europe; and other issues not covered by the 1985 Declaration. The global developments discussed are: the Human Rights Committee's general comment 15 on the position of aliens under the Covenant (1986); the concluding observations and comments of the Committee on the Elimination of Racial Discrimination (CERD); the Convention on the Rights of the Child (1989); the International Convention on the Rights of All Migrant Workers and Members of Their Families (hereafter "Migrant Workers Convention") (1990); general recommendation 21 of the Committee on the Elimination of Discrimination against Women (1992); the International Law Commission's Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States (1997); and the Rome Statute of the International Criminal Court (1998). The regional developments

occurred principally in Europe: the European Convention on Human Rights and its jurisprudence, the European Charter for Regional or Minority Languages (1992), the European Convention on Nationality (1997), and the European Convention on the Participation of Foreigners in Public Life at Local Level (1992). The paper then focuses on four issues not adequately covered by the 1985 Declaration: distinctions among non-citizens, Gypsies/Roma, trafficking in women and children, and the right to leave and return. Lastly, the working paper presents its tentative conclusions and recommendations.

I. ORIGINS OF THE SUB-COMMISSION'S DECISION ON THE RIGHTS OF NON-CITIZENS

4. The Commission on Human Rights, in its resolutions 1996/25, 1997/22, and 1998/28, called upon the Sub-Commission and its members to "further enhance cooperation with mechanisms of the Commission and, within their competence, with all relevant bodies, including human rights treaty bodies."

5. In paragraph 53 of the report of the seventh meeting of persons chairing the human rights treaty bodies (A/51/482, annex), the chairpersons recommended that "the treaty bodies take a more active role in supporting, suggesting topics for, and cooperating in the preparation of studies by the Sub-Commission".

6. CERD discussed this issue during its fiftieth session (see CERD/C/SR.1189) and decided to propose to the Sub-Commission nine topics for the preparation of studies, including the "[r]ights of non-citizens". Mr. Michael Banton, Chairman of CERD, in a letter dated 19 March 1997 (E/CN.4/Sub.2/1997/31, annex), communicated these proposals to the Chairman of the forty-eighth session of the Sub-Commission and requested that he present these proposals to the Sub-Commission during its forty-ninth session.

7. CERD has observed that:

> "In an increasing manner distinctions are being made between different categories of non-citizens (for instance in the law of the European Union). These distinctions may amount to total exclusion of persons, depriving them of the most fundamental rights and having racist implications. This raises questions from the perspective of the International Convention on the Elimination of All Forms of Racial Discrimination, in spite of article 1.2 of the Convention" (ibid.).

8. At its forty-ninth session, the Sub-Commission, in resolution 1997/5, expressed its gratitude to CERD for recommending future Sub-Commission studies

that could usefully contribute to the work of the Committee. Furthermore, the Sub-Commission, in its decision 1997/112, decided to devote special attention to subjects proposed by United Nations treaty-monitoring bodies in proposing new studies. The Sub-Commission has also responded to the request of CERD by deciding to entrust one of its members with a study on affirmative action and another with a working paper on reservations to human rights treaties, both topics suggested by CERD.

9. In discussing the present working paper, members of the Sub-Commission suggested several related issues which might be considered as part of the topic. Accordingly, the Sub-Commission, in its decision 1998/103, asked that the working paper

> "take into account ... developments since the adoption in 1985 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, overcoming impediments to ratification of the International Convention on the Rights of All Migrant Workers and Members of Their Families, discrimination between different groups of non-citizens, [and] the implications of dual citizenship ...".

10. After considering the issues initially proposed by CERD as relating to the rights of non-citizens, the present working paper will also consider those additional issues.

II. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

11. The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination in article 1, paragraph 1, which states:

> "... the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

12. The general definition of discrimination found in article 1, paragraph 1, is, however, qualified by article 1, paragraph 2, which states:

> "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."

13. Furthermore, the Convention does not affect how States bestow citizenship. Article 1, paragraph 2, is further defined in article 1, paragraph 3, which states:

> "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

14. The Convention does not, however, pre-empt the rights of non-citizens enumerated in other international instruments. In its general recommendation XI (42) on non-citizens, CERD stated that article 1, paragraph 2

> "must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights."

15. In its concluding observations and comments on several States parties' reports CERD has reflected its continuing concern about various forms of discrimination against non-citizens. Those country conclusions and recommendations are discussed below in section IV A.2.

III. OTHER RELEVANT HUMAN RIGHTS STANDARDS RELATING TO NON-CITIZENS

A. Charter of the United Nations

16. The rights of non-citizens are protected in a number of international instruments that embody the principles of equality and non-discrimination. The Charter, for example, contains a non-discrimination clause in Article 1 (3), which states that one purpose of the United Nations is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

B. Universal Declaration of Human Rights

17. The Universal Declaration of Human Rights states in article 2, paragraph 1, that:

> "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

18. In addition, it should be noted that this provision applies to "everyone" and thus protects all persons, including non-citizens, from racial discrimination and other forms of discrimination. The use of the words "such as" indicate that this is not an exhaustive list, and makes clear that the operative phrase is: "without distinction of *any kind*" (emphasis added). As Professor Richard Lillich has noted, although this list omits nationality, "this omission is not fatal ... because the list clearly is intended to be illustrative and not comprehensive." 2/ Professor Lillich also noted that "nationality would appear to fall into the category of 'distinction of any kind'." 3/

19. The Universal Declaration of Human Rights also provides in article 15 that "[e]veryone has the right to a nationality" and that "[n]o one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality."

C. International Covenant on Civil and Political Rights

20. The provisions enumerated in the International Covenant on Civil and Political Rights (ICCPR) apply generally to non-citizens. Article 2, paragraph 1, of the Covenant states:

> "Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (emphasis added).

21. The rights of aliens are also set forth in general comment 15 adopted by the Human Rights Committee in 1986 as an authoritative interpretation of the relevant provisions of the Covenant. The Committee reiterated that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens." Non-citizens "receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof." The Committee, however, noted a few exceptions: the political rights recognized in article 25 are expressly applicable only to citizens, while article 13 applies only to aliens, who are subject to expulsion. A more detailed discussion of general comment 15 is given in section IV.A.1 below.

22. Article 25 of the ICCPR states:

"Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

"(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country."

While article 13 states:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or person or persons especially designated by the competent authority."

D. International Covenant on Economic, Social and Cultural Rights

23. The International Covenant on Economic, Social and Cultural Rights (ICESCR) 4/ establishes rights that apply to everyone, regardless of citizenship. 5/ Article 6 grants everyone the right to work. Article 7 grants everyone just and favourable working conditions. Article 8 ensures everyone the right to establish trade unions. Article 9 guarantees the right to social security for everyone. Article 11 ensures the right of everyone to an adequate standard of living including adequate food, clothing and housing, and to the continuous improvement of living conditions. Article 12 grants the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Article 13 requires States Parties to recognize the right of everyone to education, and article 15 grants everyone the right to take part in cultural life.

24. The ICESCR also can be construed to forbid discrimination on the basis of nationality. Article 2, paragraph 2, states:

"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 2, paragraph 3, however, creates a specific exception to this rule only for developing countries: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." That provision does not apparently permit discrimination between nationals of different countries, only between nationals of the State party and non-nationals.

E. Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live

25. On 13 December 1985 the General Assembly adopted, by consensus, resolution 40/144 containing the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. The Declaration was the result of a Sub-Commission study, completed in 1976, on the rights of non-citizens 6/ and covers all individuals who are not nationals of the State in which they are present. The Declaration provides for the respect of fundamental human rights of aliens, including the right to life; the right to privacy; equality before the courts and tribunals; freedom of opinion and religion; and retention of language, culture, and tradition (art. 5). In addition, the Declaration prohibits individual or collective expulsion on discriminatory grounds (art. 7) and provides for trade union rights, the right to safe and healthy working conditions and the right to medical care, social security, and education (art. 8) The provisions of the Declaration are reflected in the Human Rights Committee's general comment 15 (see sect. IV.A.1 below).

26. Individuals who are not nationals of the country in which they live can generally be divided into several categories: migrant workers, refugees, documented and undocumented aliens, and individuals who have lost their nationality. All individuals in all categories are protected under the Declaration. 7/ Article 1 defines the term "alien" as "any individual who is not a national of the State in which he or she is present" (emphasis added).

Article 5, paragraph 1, grants "aliens" specific rights, without specifying any particular subgroup of aliens. Articles 9 and 10 refer to "no alien" and "any alien", respectively.

27. It should be noted that article 5 (1) (e) may allow States to distinguish between classes of aliens by restricting aliens' freedom of thought, opinion, conscience and religion, subject "only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others". Hence, if a State were to determine that distinguishing between documented and undocumented aliens is necessary to protect public safety, such a distinction would not be forbidden by the Declaration.

IV. DEVELOPMENTS SINCE THE ADOPTION OF THE DECLARATION ON THE HUMAN RIGHTS OF INDIVIDUALS WHO ARE NOT NATIONALS OF THE COUNTRY IN WHICH THEY LIVE

28. There have been significant developments since the ground-breaking study by the Baroness Elles for the Sub-Commission in 1977 and the resulting Declaration of 1985, including the developing jurisprudence of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. In addition, the Baroness Elles' did not focus on the precise problems faced by CERD, for example, in the context of the restrictive language in the International Convention on the Elimination of All Forms of Racial Discrimination, such as the difficulties arising from distinctions among non-citizens.

A. Global developments since 1985

1. General comment 15 of the Human Rights Committee

29. After the 1985 Declaration was adopted, one of the first developments regarding the rights of non-citizens was the adoption by the Human Rights Committee at its twenty-seventh session in 1986 of general comment 15 on the position of aliens under the ICCPR. The Committee determined that it would be helpful to state the position of aliens under the Covenant because it found that States Parties had "often failed to take into account that each State Party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction'" (para. 1).

30. As noted above, general comment 15 states that "in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness" (para. 1).

Paragraph 2 clarifies the general rule that "each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens", the only exceptions being those expressly articulated in article 25 (right to participate in government), which applies only to citizens, and article 13 (expulsion), which applies only to aliens.

31. The Committee noted that "[a] few constitutions provide for equality of aliens with citizens"; however, general comment 15 reflects the Committee's concern that "[i]n certain cases ... there has clearly been a failure to implement Covenant rights without discrimination in respect of aliens" (para. 3).

32. The Committee stressed that "[t]he Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States Parties in their legislation and in practice as appropriate". Furthermore, the Committee placed on States the responsibility to "ensure that the provisions of the Covenant and the rights under it are made known to aliens within their jurisdiction" (para. 4).

33. In paragraph 7, the Committee expressly reiterated the fundamental rights of aliens protected by the Covenant and that "[t]here shall be no discrimination between aliens and citizens in the application of [those] rights". The full text of the paragraph states:

> "Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may

not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant."

34. General comment 15 clarifies an alien's right to freedom of movement within a territory, and the right to leave that territory "may only be restricted in accordance with article 12, paragraph 3" of the Covenant (para. 8). 8/

35. General comment 15 also addresses the expulsion of aliens: According to paragraph 9, "[a]n alien who is expelled must be allowed to leave for any country that agrees to take him". Paragraph 10, while noting that the Covenant regulates only the procedure and not the substantive grounds for expulsion, stresses the right of appeal and review: "[a]n alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one". The right to appeal may only be abrogated when "'compelling reasons of national security' so require".

2. Concluding observations and comments of the Committee on the Elimination of Racial Discrimination

36. CERD has made concluding observations and comments on the rights of non-citizens with regard to seven countries, reflecting its mandate under the Convention to address discrimination against non-citizens.

37. For example, in examining the report of Croatia (CERD/C/249) at its forty-second session in 1993, CERD "noted with concern the general lack of

clarity in a number of basic legal provisions guaranteeing non-discrimination in the enjoyment of human rights and fundamental freedoms for members of the minority communities", noting that "[i]n some cases, guarantees would appear to apply only to citizens of Croatia" (A/48/18, para. 496). The Committee expressly noted that article 14 of the Croatian Constitution prohibiting racial discrimination and article 35 guaranteeing fundamental freedoms appeared to apply only to Croatian citizens (ibid., para. 481).

38. In examining the report of the Republic of Korea (CERD/C/221/Add.1) at its forty-third session in 1993, CERD "sought clarification on matters relating to naturalization and the rights to inheritance of naturalized citizens; foreigners' eligibility to join or create trade unions and enjoy the benefit of their protection; the level of wages received by foreign workers; and foreign workers' enjoyment of the rights to medical and other social services" (ibid., para. 209). The government representative informed CERD that "naturalized citizens benefited from the same rights and had the same obligations as other citizens" and that "foreign workers had the same rights as workers who were nationals of the country, provided that they were legally registered for work" (ibid., para. 218). In its concluding observations on the report, however, the Committee expressed its concern "at the reported discrimination suffered by spouses and children of foreign workers" (ibid., para. 229).

39. During its examination at the same session of the report of Kuwait (CERD/C/226/Add.5), CERD, recalling that "States Parties were under an obligation to report fully on legislative measures relating to foreigners and their implementation" (ibid., para. 362), asked for more precise information on the current situation of certain categories of persons, and in particular Bedoons and Palestinians, who were reported to be in a very vulnerable position. According to reports from various sources, Bedoons, Palestinians, Iraqis and citizens of other countries that had not participated in the coalition against Iraq had been dismissed from public employment, excluded from the public school system and subjected to ill-treatment, detention, expulsion, and torture. In addition, CERD expressed concern that domestic staff of Asian origin "were subjected to debt bondage, other illegal employment practices, passport deprivation, illegal confinement, rape and physical assault" (ibid.). The Committee recommended that Kuwait should "take

steps to guarantee the enjoyment by individuals belonging to vulnerable groups of foreigners, including foreign domestic servants, of the rights enshrined in the Convention without any discrimination" (ibid., para. 380).

40. In examining the report of Nigeria (CERD/226/Add.9), CERD inquired into the rights and guarantees of non-citizens under the Nigerian Constitution and why a distinction was made in national legislation between citizens of Nigeria by birth and other Nigerians. CERD emphasized that under article 5 of the Convention, States "had an obligation to guarantee the civil, political, economic, social and cultural rights of the whole population and not just of citizens" (ibid., para. 314). Furthermore, CERD "recommended that national legislation be brought into full compliance with the provisions of the Convention, in particular regarding ... the effective enjoyment of the rights set forth in article 5" (ibid., para. 327).

41. CERD examined a subsequent report of Nigeria (CERD/C/263/Add.3 and CERD/C/283) at its forty-seventh session in 1995. In connection with article 1 of the Convention, CERD "noted that section 39 (1) of the 1979 Nigerian Constitution provided for the protection of citizens against discrimination, but did not cover non-citizens or provide protection against discriminatory actions or practices outside the governmental sector" (A/50/18, para. 602).

42. At its forty-second session in 1993, CERD also examined the report of Qatar (CERD/C/207/Add.1). With respect to article 2 of the Convention, CERD inquired whether article 9 of the Constitution of Qatar, which guaranteed equality of all individuals in regard to their rights and obligations, also applied to non-citizens and whether non-Arabs were able to acquire Qatar nationality, whether foreign workers were discriminated against, and whether the Government intended to adopt legislation prohibiting discrimination against foreign workers. With respect to article 5 of the Convention, CERD expressed concern about "whether free choice of employment was guaranteed to foreigners, whether foreign workers had access to all professions and trades, whether the Government envisaged measures to eliminate differences between citizens and foreign workers concerning access to all trades, whether non-citizens were eligible to receive social security benefits, and whether freedom to leave the country and return was guaranteed to non-citizens"

(A/48/14, para. 91). CERD explicitly noted that "legislation restricting non-Arab lawyers from pleading a case before the courts was discriminatory" (ibid.).

43. CERD examined the report of Italy (CERD/C/237/Add.1) at its forty-sixth session in 1995. Regarding article 5 of the Convention, CERD expressed concern that legislation concerning political asylum for non-European Union citizens might be "more restrictive in matters relating to the status and employment of the people concerned than the ordinary Italian legislation in those areas" (A/50/18, para. 83). CERD also expressed concerns "about some cases involving the ill-treatment of foreigners of non-[European] Community origin by police officers and prison staff" (ibid., para. 101).

44. CERD considered the report of the United Arab Emirates (CERD/C/279/Add.1) at its forty-seventh session in 1995. With respect to article 5 of the Convention, CERD "asked to what extent foreign workers were entitled to have their children join them and to have them educated in their own language, and whether those children were free to practise their religion" (ibid., para. 550). CERD also inquired into the content of bilateral agreements between the United Arab Emirates and other countries regarding the status of foreign workers. Members of CERD "expressed their deep concern at information from various sources that foreign workers, particularly women from Asian countries, were subjected to inhuman treatment" (ibid.). CERD also asked whether aliens living in the United Arab Emirates had the right to assemble freely and practise their culture. CERD recommended that the United Arab Emirates "show the utmost diligence in preventing acts of ill-treatment being committed against foreign workers, especially foreign women domestic servants, and take all appropriate measures to ensure that they are not subjected to any racial discrimination" (ibid., para. 570).

3. Convention on the Rights of the Child

45. The Convention on the Rights of the Child states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". In addition, the Convention requires States Parties to:

"respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's

race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status" (art. 2.1).

46. The Convention applies to all children regardless of their race or citizenship status. Because States have an obligation to "each child within their jurisdiction", States may not distinguish between children based on their citizenship or race; all children under the jurisdiction of the State must be treated equally.

4. International Convention on the Protection of All Migrant Workers and Members of Their Families

47. A major development with respect to the rights of non-citizens occurred when the General Assembly adopted the International Convention on the Protection of All Migrant Workers and Members of Their Families by its resolution 45/158 of 18 December 1990. The Convention was the result of a request by the Economic and Social Council (ECOSOC) to the Sub-Commission on Prevention of Discrimination and Protection of Minorities to study the condition of migrant workers. 9/ The Sub-Commission, in its resolution 6 (XXVI) of 19 September 1973, appointed Ms. Halima Warzazi as Special Rapporteur to prepare a study on the exploitation of labour through illegal migration. Her study 10/ recommended, *inter alia*, that the United Nations should be involved in order to ensure that all humanitarian aspects of the problem of the exploitation of migrant workers are covered.

48. The Migrant Workers Convention covers all migrant workers and their families and provides for: non-discrimination with respect to rights of migrant workers (art. 7), the assurance of fundamental human rights (arts. 8-24), equality of treatment between nationals and migrant workers in regard to work conditions and pay (art. 25), the right to participate in trade unions (art. 26), equal access to social security (art. 27), right to emergency medical care (art. 28) and equality of access to public education (art. 30). In addition, States parties must ensure respect for workers' cultural identity (art. 31) and inform migrant workers of their rights under the Convention (art. 33).

49. The pace of ratification of the Migrant Workers Convention has not been particularly rapid. As of 5 May 1999, the Convention had been ratified or acceded to by 11 States - Azerbaijan, Bosnia and Herzegovina, Cape Verde, Colombia, Egypt, Mexico, Morocco, the Philippines, Seychelles, Sri Lanka and

Uganda - and signed by Bangladesh, Chile, and Turkey (20 States parties are required for the Convention to come into force). In order to encourage ratification of the Convention, the Secretary-General, the Commission on Human Rights and the Sub-Commission have called upon all States to consider signing and ratifying or acceding to the Convention as a matter of priority. Because migrant workers are non-citizens, and therefore are included in any instruments regarding the rights of non-citizens, they are included in the analysis of this working paper. For a more thorough discussion of the specific problems facing migrant workers and the ways of overcoming impediments to ratification of the Migrant Workers Convention, see the addendum to this document.

5. Convention on the Elimination of All Forms of Discrimination against Women

50. The Convention on the Elimination of All Forms of Discrimination against Women establishes the rights of women with regard to nationality. These rights become particularly important when a woman marries a national of a country other than her own. In order to protect women's nationality, article 9 of the Convention provides:

> "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
>
> "2. States Parties shall grant women equal rights with men with respect to the nationality of their children."

51. The Women's Convention focuses on preventing the loss of women's nationality because, as the Committee on the Elimination of Discrimination against Women (CEDAW) noted in its general recommendation 21 on equality in marriage and family relations, adopted at its thirteenth session in 1992,

> "Nationality is critical to full participation in society. In general, States confer nationality on those who are born in that country. Nationality can also be acquired by reason of settlement or granted for humanitarian reasons such as statelessness. Without status as nationals or citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and

a choice of residence. Nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality." 11/

6. International Law Commission

52. The International Law Commission has sought to develop an instrument regarding the impact of State succession on the nationality of natural and legal persons since 1993. At its forty-ninth session held in Geneva from 12 May to 18 July 1997, the Commission provisionally adopted the text of draft articles on Nationality of natural persons in relation to the succession of States (A/52/10, chap. IV.C). Part I of the draft articles applies to all cases of State succession and conflicts of nationality arising therefrom; Part II pertains to the implementation of these provisions in specific instances of State succession.

53. The draft articles on Nationality of natural persons in relation to the succession of States are primarily concerned with the prevention of statelessness. Article 1 of the draft articles is the foundation for preventing statelessness. Specifically, article 1 provides that: "[e]very individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles".

54. According to article 4, habitual residents of the successor State are presumed to acquire nationality of the successor State on the date of succession. Article 11 places the unity of the family above the matter of habitual residence, stating that States concerned shall take all appropriate measures to allow families to remain together or to be reunited. According to article 12, all children born after succession have the right to the nationality of the territory in which they are born. According to article 14, the method of determining nationality shall be non-discriminatory. Article 15 follows the non-discrimination clause by prohibiting arbitrary decisions concerning nationality issues, stating that persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State

or any right of option, to which they are entitled in relation to the succession of States. Further procedural requirements are set forth in article 16, which states that:

> "[a]pplications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay and relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review."

55. The draft articles clearly, comprehensively and procedurally prevent statelessness upon succession of a State. States are not required, however, to grant nationality to individuals having no effective link with the State unless this would result in treating those persons as if they were stateless.

7. International Criminal Court

56. On 17 July 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court (A/CONF.183/9). Article 5 enumerates four crimes that fall within the jurisdiction of the Court: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Article 6 defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" (the language used by the Statute to define "genocide" is taken directly from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide). Therefore, acts intended to destroy a national, ethnical, racial or religious minority are crimes within the jurisdiction of the Court. In addition, under article 7 (h), "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law" is also considered a crime against humanity. Because non-citizens are ordinarily of a different national group, the International Criminal Court will apparently protect non-citizens from serious abuses committed with intent to cause annihilation of the group, as well as persecution.

57. As of 5 May 1999, two States - Senegal and Trinidad and Tobago - had ratified the Rome Statute.

B. Regional developments since 1985

58. In addition to the developments at the global level since the 1985 Declaration there have been very significant regional developments concerning the rights of non-citizens, particularly in Europe.

1. European Convention on Human Rights and its jurisprudence

59. "The provisions of the European Convention on Human Rights (European Convention) are in principle applicable without any distinction to citizens within any given State, citizens of other member States, aliens or stateless persons." 12/ The European Convention does not, however, cover certain rights pertaining to non-citizens. For example, there is no right to be admitted to a country and no protection from deportation or other removal. 13/

60. The European Convention in article 14 forbids discrimination, stating that:

> "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion political or other opinion, national or social origin, association with a national minority, property, birth or other status."

61. The Seminar on Exclusion, Equality Before the Law and Non-Discrimination organized by the Council of Europe in 1994 noted that

> "Article 14 [of the European Convention on Human Rights] does not forbid every difference in treatment. Equality does not necessarily mean identical treatment in every instance. A differentiation does not constitute discrimination if the aim is to achieve a purpose which is legitimate and if the criteria used are reasonable and objective ... Only differentiation which is not factually justified is inadmissible. According to the European Court's established case-law a distinction is discriminatory ... if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realized'." 14/

62. In addition, article 16 of the European Convention states that nothing in article 14, among others, "shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activities of aliens". 15/

63. In 1997 the European Court of Human Rights in *Bouchelkia v. France* dealt with the rights of non-citizens, particularly in the context of deportation. 16/ Mr. Bouchelkia was born in Algeria in 1970 and emigrated to France with his mother at age two. In 1990, Mr. Bouchelkia was ordered deported because of a criminal conviction for rape in 1987. Mr. Bouchelkia applied to the European Court of Human Rights to find a violation of article 8 of the European Convention, which states that "(1) [e]veryone has the right to respect for his private and family life ... [and] (2) [t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security ..."

64. The Court found no such violation. The Court concluded that the interference in Mr. Bouchelkia's family life "had aims which were entirely compatible with the Convention, namely 'the prevention of disorder or crime'". 17/ The Court further stated:

> "[I]t is for the Contracting States to maintain public order in particular by exercising the right as a matter of well-established international law and subject to their treaty obligation, to control the entry and residence of aliens. For that purpose they are entitled to order the expulsion of such persons convicted of criminal offences." 18/

2. European Charter for Regional or Minority Languages

65. The European Charter for Regional or Minority Languages clearly differentiates between "minorities" and "non-citizens" in its definition of "regional or minority languages". Article 1 of the Charter states that the term "'regional or minority languages' ... does not include ... the languages of migrants."

66. In 1995, the Council of Europe Press published a booklet entitled "Tackling racism and xenophobia: practical action at the local level", one of a series of booklets accompanying the report *Community and Ethnic Relations in Europe* and containing an account of an expert meeting held in Berlin in 1993 on practical action at the local level to combat racism and xenophobia. Whereas the European Charter for Regional or Minority Languages does not apply to migrants, according to the booklet, the Council of Europe considers that "community relations" includes all aspects of the relations between migrants or ethnic groups of "immigrant origin" and the host society. Although it is

unclear how far back the Council would trace "immigrant origin", it is conceivable that "community relations" is intended to include both migrants and national minorities.

67. Other relevant developments include Recommendation 1134 (1990) on the rights of minorities adopted by the Parliamentary Assembly of the Council of Europe, Recommendation No. R (92) 12 on community relations, adopted in 1992 by the Committee of Ministers, the recommendations of the Committee of Inquiry into Racism and Xenophobia of the European Parliament (1991), and the resolution of 5 October 1995 of the European Council and the representatives of the Governments of the member States on the fight against racism and racial discrimination in the fields of employment and social affairs, and the 1990 Copenhagen Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Cooperation in Europe.

3. European Convention on Nationality 19/

68. One of the most significant norm-setting developments since 1985 was the European Convention on Nationality, adopted by the Council of Europe on 6 November 1997. Article 4 of that Convention lists the principles upon which the rules of nationality of each State party shall be based, stating that:

> "(a) everyone has the right to a nationality; (b) statelessness shall be avoided; (c) no one shall be arbitrarily deprived of his or her nationality; [and] (d) neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse."

69. The European Convention on Nationality also establishes the right to nationality of stateless persons. Article 6 states:

> "1. Each State Party shall provide in its internal law for its nationality to be acquired *ex lege* by ... (b) foundlings found in its territory who would otherwise be stateless.
>
> "2. Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality ...
>
> "..."

"4. Each State Party shall facilitate in its internal law the acquisition of its nationality for ... (g) stateless persons and recognized refugees lawfully and habitually resident on its territory."

4. European Convention on the Participation of Foreigners in Public Life at Local Level

70. The Convention on the Participation of Foreigners in Public Life at Local Level, considering that "the residence of foreigners on the national territory is now a permanent feature of European societies", provides for freedoms of expression, assembly and association "on the same terms as to its own nationals" (chap. A, art. 3), allows for "consultative bodies to represent foreign residents at local level" (chap. B), and grants the "right to vote in local authority elections" (chap. C).

71. As of 5 May 1999, the Convention on the Participation of Foreigners in Public Life at Local Level had been signed by eight countries (Cyprus, Denmark, Finland, Italy, the Netherlands, Norway, Sweden and the United Kingdom) and had been ratified by four (Italy, the Netherlands, Norway and Sweden). The Convention entered into force on 5 January 1997.

C. Issues not adequately covered by the 1985 Declaration

1. Distinctions among non-citizens

72. Increasing distinctions are being made between different categories of non-citizens. This phenomenon is a particularly prevalent practice of supernational political or economic unions, such as the European Union 20/ and the North American Free Trade Agreement (NAFTA). 21/ As Mr. Banton, Chairman of CERD, stated in his letter to the Sub-Commission, "such developments raise questions from the perspective of the International Convention on the Elimination of All Forms of Racial Discrimination" (E/CN.4/Sub.2/1997/31, annex, p. 4).

73. In some respects these problems are not new. Baroness Elles noted in 1977 that violations had continued in many parts of the world, both extensively and frequently, against the human rights of non-citizens. 22/ In December 1997, the United Nations Seminar on Immigration, Racism, and Racial Discrimination concluded that "many countries had experienced an upsurge in racism, racial discrimination and xenophobia towards, and violence against, migrants and immigrants" (E/CN.4/1998/77/Add.1, annex, para. 8). Baroness Elles, in her study on the rights of non-citizens, concurred, stating that "[t]he individual who most frequently, both in point of time and of

place, gets singled out for distinction from his fellow man is the alien". 23/ Likewise, Mr. Asbjörn Eide, in his study for the Sub-Commission, noted in 1989 that:

> "[p]roblems related to aliens ... are sometimes cast in terms of race. Here, as in many other contexts, the notion of 'race' is used in a vague and imprecise way. Aliens often ... belong to different cultures and are sometimes of a different colour. The greater the apparent differences to the population in the country of residence, the more likely they are to be exposed to xenophobic sentiments and behaviour from segments of that population." 24/

74. The Human Rights Committee has noted that "States parties have often failed to take into account that each State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction'". 25/ Furthermore, Baroness Elles concluded that:

> "[t]he problem of the protection and treatment of aliens is not transient, temporary, or local, but continuing and universal. It is not an isolated problem, in point of time or of place, and therefore a universal approach is needed and an effort to reach universal consensus on this problem must be made." 26/

75. The rights of non-citizens enumerated in international instruments have been neither adequately nor universally protected and promoted. Baroness Elles concluded further that "[t]he application of the provisions of international human rights instruments to aliens is unclear and uncertain, and existing means of implementation inadequate". 27/ For this reason, CERD should consider expressly articulating the rights of individuals who are not citizens of the country in which they live and making more explicit the incorporation of protections for non-citizens.

2. Gypsies/Roma

76. Gypsies (Roma) pose a special problem in areas of race and non-discrimination. Gypsies are not aliens per se, but their citizenship rights are often not recognized. Further complicating the issue surrounding the rights of Gypsies is the concept of Gypsies as a "national minority" - a term which does imply citizenship.

77. Special concerns regarding Gypsies have recently begun to be considered seriously by the international community. In 1991, the Congress of Local and

Regional Authorities of Europe (CLRAE) of the Council of Europe organized a hearing entitled "The Gypsy people and Europe: the continuation of the tradition in a changing Europe" as part of the European Gypsy Festival; the hearing attracted 100 participants. 28/

78. Two major accomplishments regarding Gypsies took place in 1993. CLRAE adopted resolution 249 - Gypsies in Europe: the role and responsibility of local and regional authorities. This resolution provided for the establishment of the Network of Cities, a small core of cities which is to act as a "testing ground for good practice and sound examples [regarding Gypsies] to be developed through dialogue and exchange of experience". 29/ Also in 1993, two important decisions of relevance to Gypsies were taken at the meeting of European heads of State and Government in Vienna: the Council of Europe was instructed to draw up legal instruments in support of minorities and to launch an action plan and international campaign against racism, xenophobia and intolerance. 30/ From this statement, it appears that Gypsies are considered "minorities" rather than "non-citizens" or "migrants". Substantiating this claim is the statement by the Deputy Secretary-General of CLRAE Mr. Leuprecht, that:

> "the Council of Europe was fully aware of the need to avoid any definition of minorities that might contain further seeds of discrimination and exclusion. Extreme care would have to be taken to ensure that the concept of national minority was not interpreted in such a way as to exclude Gypsies." 31/

79. By 1994, CLRAE was able to attract approximately 200 people from some 20 European countries to a conference entitled "Towards a tolerant Europe: the contribution of Gypsies". The debates at the conference focused on dialogue between local authorities and Gypsies and the future for Gypsies as citizens of a democratic Europe. Following the conference, CLRAE concluded, "At a national level there can be no meaningful action without granting citizenship of the country of residence and freedom of movement [to Gypsies]." 32/

80. The 1994 conference resulted in two major proposals: the drafting of a covenant between Gypsies and the European institutions, and the introduction of "a policy to stabilize Gypsy populations by granting them permanent

residence rights which would allow them to solve their housing and health problems and satisfy their needs for education and vocational training." 33/

81. Perhaps the most significant development in regard to the situation of Gypsies in Europe is the development of a plan of work by the Specialist Group on Roma/Gypsies of the Committee of Ministers of the Council of Europe. 34/ The group has identified "human rights problems (discrimination on ethnic grounds, acts of violence, police behaviour and attitudes, access to rights, law enforcement, racism, racial attacks and incitement to racial hatred) [and] legal status (nationality and citizenship, minority rights)" as among the "main problems facing Roma/Gypsies in Europe today". 35/ In response to these and other problems facing Gypsies, the "Group will consider the possibility of drawing up in due course a comprehensive report on the situation of Roma/Gypsies in Europe". 36/

3. Trafficking in women and children

82. The 1985 Declaration on the Rights of Non-Citizens did not focus on trafficking in women and children. There had been some developments, however, prior to 1985: in 1951, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Trafficking Convention) entered into force. The Trafficking Convention cited four international instruments which were already in force at that time: (i) the International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic; (ii) the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic; (iii) the International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children; and (iv) the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age. The purpose of the Trafficking Convention was to consolidate those four instruments.

83. Article 17 of the Trafficking Convention states:

> "The Parties to the present Convention undertake, in connection with immigration and emigration, to adopt or maintain such measures as are required, in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution."

Specifically, article 17 requires States to enact legislation to protect women and children while travelling, to warn the public of the dangers of

trafficking, to take measures to prevent trafficking at ports of entry, and to make sure that the proper authorities are aware of the arrival of women who appear to be trafficking victims. Under article 19, countries agree to care for and repatriate trafficking victims.

84. A trafficking provision was included in the 1979 Convention on the Elimination of All Forms of Discrimination against Women, which has been ratified by 72 States. Article 6 reads: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."

85. The 1989 Convention on the Rights of the Child calls for the elimination of trafficking in children for any purpose. Article 11 requires States parties to "take measures to combat the illicit transfer and non-return of children abroad" Article 35 requires States parties to "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form". Article 36 continues: "States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare."

86. In addition to those treaties, there have been a number of efforts to improve international mechanisms to stop trafficking. For example, in October 1994, the International Organization for Migration organized an international seminar on international responses to trafficking in migrants.

87. For the past few years, the International Labour Organization (ILO) has been actively involved in finding solutions to the problem of trafficking. In May 1996 the ILO collaborrated with the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Organization for Security and Cooperation in Europe (OSCE) to organize a conference in Geneva to examine issues of population movements in the Commonwealth of Independent States, and devoted particular attention to irregular migration. 37/ In June 1996, in collaboration with the European Union, the ILO held a conference in Vienna to help design common instruments to combat trafficking in women in Europe. The ILO also prepared the Declaration and Agenda for Action adopted by the World Congress Against Commercial Exploitation held in Stockholm in August 1996. The Congress included representatives of 122 countries, as well as numerous NGOs.

88. In 1998 the International Programme on the Elimination of Child Labour (IPEC) of the ILO compiled an analysis on child trafficking in eight Asian countries. Following this initial study, IPEC has been actively involved in action against child trafficking both at the national level and subregional levels. In 1998, at the national level IPEC established the National Plan of Action against Trafficking in Children and their Commercial Sexual Exploitation in Nepal. 38/ At the subregional level, IPEC proposed the Framework for Action, "Trafficking in Children for Labour Exploitation in the Mekong Sub-Region", at a consultation held in Bangkok. The Framework for Action includes prostitution as a form of labour exploitation. 39/

89. Trafficking in women is a global problem which takes place both between and within regions. 40/ Women and children become vulnerable to trafficking because of social and economic relations of power, including the "economic disparity between the richest States or regions and the poorest". In many countries, large proportions of prostitutes are illegal immigrants - often trafficked women and girls. 41/

90. Kathleen Barry has addressed the global proliferation of prostitution, and the increase in trafficking in women, and believes that trafficking and prostitution are perpetuated by international sex industries. In 1991 Barry (in collaboration with Wassyla Tamzali of UNESCO) developed the proposed Convention against Sexual Exploitation:

> "The proposed Convention would require States Parties to take all appropriate measures to provide victims of sexual exploitation, including prostitution and traffic in women, with refuge and protection and to repatriate those who desire to be repatriated. Employers who sexually exploit women in the migrating process will be held criminally liable." 42/

91. Because sexually exploited women often lack proof of their citizenship or are stateless when they finally escape their exploiters, and because stateless persons are often not recognized by the new country in which they find themselves, the proposed convention provides that: "refugee status shall be granted to all victims of sexual exploitation, whether they have entered the country legally or illegally." 43/ The proposed article 2 specifically states that trafficking is a form of sexual exploitation. 44/

92. The Working Group on Contemporary Forms of Slavery of the Sub-Commission has recognized the variety of circumstances in which trafficking occurs, adopting at its twenty-second session in 1998 a recommendation dealing with "Prevention of the transborder traffic in women and girls for sexual exploitation". In that recommendation, which became section II of resolution 1998/19, the Sub-Commission explicitly declared that "transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights", citing the various conventions against slavery and forced labour as well as many other instruments. The Working Group is holding a Consultation on Trafficking, Prostitution and the Global Sex Industry from 21 to 23 June 1999, followed by the twenty-third session of the Working Group which will certainly make recommendations on these issues to the fifty-first session of the Sub-Commission.

4. The right to leave and return

93. Article 13 of the Universal Declaration of Human Rights sets forth the basic right to freedom of movement, and does not distinguish between citizens and not-citizens. Article 13 states that: "[e]veryone has the right to freedom of movement and residence within the borders of each State" and that "[e]veryone has the right to leave any country, including his own, and to return to his country".

94. Similar provisions are set forth in the International Covenant on Civil and Political Rights, although the Covenant appears to draw a distinction between documented and undocumented aliens. Article 12 states:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> "2. Everyone shall be free to leave any country, including his own.
>
> "...
>
> "4. No one shall be arbitrarily deprived of the right to enter his own country." (emphasis added.)

95. The Human Rights Committee also held that countries may not apply different immigration standards based on sex. In Shirin Aumeerudy-Cziffra et al. v. Mauritius, 20 Mauritian women contested the immigration law adopted by the Government which provided that if a Mauritian woman married a man from

another country, the husband must apply for residence in Mauritius and that permission may be refused. If, however, a Mauritian man married a foreign woman, the foreign woman was entitled automatically to residence in Mauritius. The Committee held that Mauritius had violated the Covenant by discriminating between men and women without adequate justification. 45/

96. Regional instruments contain similar provisions regarding the freedom of movement. The African Charter on Human and Peoples' Rights provides for the freedom of movement within the borders of a State where an individual lawfully resides (art. 12 (1)), and the general right to leave and return (art. 12 (2)). Non-nationals may only be deported in accordance with law (art. 12 (4)) and mass expulsions of non-citizens are prohibited (art. 12 (5)).

97. While most human rights instruments address freedom of movement in a single article or even more tangentially, two declarations address the issue in a more comprehensive fashion: the Declaration on the Right to Leave and the Right to Return, adopted by a colloquium held in Uppsala, Sweden in 1972, and the Strasbourg Declaration on the right to leave and return adopted by a meeting of experts held in Strasbourg in 1986.

98. More recently, Mr. Volodymyr Boutkevitch prepared a working paper on the right to freedom of movement and related issues in implementation of decision 1996/109 of the Sub-Commission (E/CN.4/Sub.2/1997/22). Mr. Boutkevitch's working paper discussed the right to freedom of movement and related issues in international legal instruments, the right to freedom of movement at the national level, and the state of freedom of movement in the last 10 years.

V. DEVELOPING FURTHER HUMAN RIGHTS STANDARDS AND IMPLEMENTATION PROCEDURES IN REGARD TO NON-CITIZENS: TENTATIVE CONCLUSIONS AND RECOMMENDATIONS

99. Continued discriminatory practices against non citizens demonstrate the absence of effective standards regarding the rights of individuals who are not citizens of the country in which they live.

100. States should be encouraged to abide by the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

101. CERD should consider how to interpret article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Discrimination, so

as to avoid undermining the protections for non-citizens under other human rights treaties and within the Convention itself. CERD should be encouraged to prepare a general recommendation on the rights of non-citizens. One objective of a further study by the Sub-Commission might be to help formulate such a general recommendation, in cooperation with CERD.

102. CERD is correct in noting that "distinctions are being made between different categories of non-citizens" (E/CN.4/Sub.2/1997/31, annex, p. 4) and that "these distinctions may amount to total exclusion of persons, depriving them of the most fundamental rights and having racist implications" (ibid.). Such distinctions raise questions from the perspective of the Convention, in spite of article 2 (1), and this subject deserves further study in light of recent developments.

103. CERD should consider expressly articulating the rights of individuals who are not citizens of the country in which they live and to make more explicit the incorporation of protections for non-citizens.

104. The Human Rights Committee has recognized the full rights of non-citizens under the Covenant in its general comment 15 on the position of aliens under the Covenant. Because aliens tend to be of a minority race, discrimination against aliens has some of the same underlying tendencies as racism, and there is a substantial relationship between discrimination on the basis of race and discrimination against aliens. Therefore, it is desirable for CERD to coordinate its work with the substance of general comment 15 and other efforts of the Human Rights Committee to protect the rights of non-citizens. For example, a new general recommendation on the rights of non-citizens should take into account the terms of the Convention, the experience of CERD in reviewing States parties' reports and the experience of the Human Rights Committee, as well as other sources of relevant jurisprudence such as that of other treaty bodies and the European Court of Human Rights. Further research needs to be devoted to gathering and analysing those experiences and relevant jurisprudence.

105. The rights of non-citizens should be explicitly addressed during the upcoming World Conference against Racism and Racial Discrimination, Xenophobia and Related Intolerance.

106. This working paper should be transmitted to CERD in its present form for its advice and reactions. It would be particularly useful if CERD could

indicate the extent to which the present working paper fulfils CERD's request of 1997, and in particular address the following questions: (i) Are there subjects or areas of inquiry that should be pursued? (ii) Does a further working paper need to be prepared on this topic and if so, on what issues? (iii) Would it be helpful for the working paper to include an initial draft of a further general recommendation on the rights of non-citizens, in cooperation with CERD and for the consideration of CERD? (iv) Does CERD consider that a full study of this subject would be useful?

107. If CERD determines that a full study would be helpful, the Sub-Commission should transmit this working paper, along with relevant comments from CERD, to the Commission, along with a proposal for a full study to be undertaken.

Notes

1/ Mr. Weissbrodt thanks Ms. Amy Schroeder and Mr. Bret Thiele for their assistance in preparing this working paper.

2/ Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, 1984, p. 43.

3/ Ibid., p. 46.

4/ Most of the provisions in Part III of the Covenant refer specifically to the "the right of everyone" (emphasis added).

5/ For a more thorough treatment of non-nationals under the International Covenant on Economic, Social and Cultural Rights, see John A. Dent, Research paper on the Social and Economic Rights of Non-Nationals in Europe, 1998 (commissioned by the European Council on Refugees and Exiles).

6/ Baroness Elles, International Provisions Protecting the Human Rights of Non-Citizens, United Nations publication, sales No. E.80.XIV.2.

7/ The Office of the United Nations High Commissioner for Refugees (UNHCR) was established specifically to provide for the special needs and protection of persons found to be refugees under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

8/ Article 12, paragraph 3, of the Covenant states that the right to freedom of movement "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

9/ Resolution 1789 (LIV) of 18 May 1973. See also Ryszard Cholewinski, *Migrant Workers in International Human Rights Law*, 1997.

10/ *Exploitation of Labour through Illicit and Clandestine Trafficking*, United Nations publication, Sales No. E.86.XIV.1. See also Cholewinski, ibid.

11/ See also the Convention on the Nationality of Married Women, adopted by General Assembly resolution 1040 (XI) of 29 January 1957.

12/ Exclusion, Equality Before the Law and Non-Discrimination. Proceedings of a seminar organized by the Secretariat General of the Council of Europe in cooperation with the International Center for sociological, criminal and penitential research and studies (INTERCENTER) of Messina, Italy (Taormina Mare, Italy, 29 September-1 October 1994), p. 135. Also published in French under the title Exclusion, égalité devant la loi et non-discrimination.

13/ See European Convention on Nationality, ETS No. 166, Strasbourg, 6 November 1997, but see also Protocol No. 4 to the European Convention on Human Rights, article 4 ("Collective expulsion of aliens is prohibited.").

14/ See *supra* note 12.

15/ In addition, "customary international law provides evidence that States are free to restrict the political activity of aliens". See *supra* note 124.

16/ *Bouchelkia* v. *France*, European Court of Human Rights, judgement of 29 January 1997.

17/ Ibid.

18/ Ibid. At the Seminar on Exclusion, Equality Before the Law and Non-Discrimination, it was suggested that "'integrated aliens' should no more or, only under very exceptional circumstances, be liable to expulsion than nationals. Mere nationality may not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what, in both cases, may be called his 'own country'". See also the International Convention on the Rights of All Migrant Workers and Members of Their Families, art. 25.

19/ Asbjörn Eide has thoroughly examined the right to a nationality in his article "Citizenship and international law with specific reference to human rights law: status, evolution and challenges". Eide includes a history of the concept of citizenship and its development over time, and also attempts to answer the question: "What are the rights of a given individual in regard to the country in which he or she lives?".

20/ See Nora V. Demleitner, "The Fallacy of Social 'Citizenship', or the Threat of Exclusion", *Georgia Immigration Law Journal*, vol. 12 (1997), pp. 35, 59.

21/ See North American Free Trade Agreement, 8 December 1993, United States-Canada-Mexico, chap. 16, art. 1603, para. 1.

22/ See supra note 6.

23/ Ibid., para. 293.

24/ Asbjörn Eide, "Study on the achievements made and obstacles encountered during the decades to combat racism and racial discrimination" (E/CN.4/Sub.2/1989/8), para. 370.

25/ General comment 15 (citing the International Covenant on Civil and Political Rights, article 2 (1)).

26/ Elles, supra note 6, para. 366 (1).

27/ Ibid., para. 366 (20).

28/ CLRAE, Congress Newsletter, No. 1, January-February 1992. The Newsletters are available on-line at www.coe.fr/cplre/newsletter.

29/ CLRAE, Congress Newsletter, No. 4, August-September 1994.

30/ Ibid.

31/ Ibid.

32/ Ibid.

33/ Ibid.

34/ Plan of Work of the Specialist Group on Roma/Gypsies (MG-S-ROM), Council of Europe, Committee of Ministers, 587th meeting of the Ministers' Deputies, 1 April 1997, appendix 3, item 6.3. See www.coe.fr/cm/dec/1997/587/587.a3.html.

35/ Ibid., para. 2 (b) and (c).

36/ Ibid., para. 4.

37/ See Bimal Ghosh, Huddled Masses and Uncertain Shores: Insights into Irregular Migration, 1998, p. 134.

38/ IPEC-ILO, Fighting child trafficking at national level, action in Nepal. See www.ilo.org/public/english/90ipec/publ/expls-98/exampl13.htm.

39/ "Trafficking in Children for Labour Exploitation in the Mekong Sub-region: A Framework for Action. Section 4 - The ILO-IPEC Programme Strategy to Combat Trafficking in Children for Labour Exploitation, including Child Prostitution. See www.ilo.org/public/english/90ipec/publ/traffic.htm.

40/ Kathleen Barry, The Prostitution of Sexuality, 1995, p. 165.

41/ Ibid., p. 195. "Local prostitution in Paris and in major cities throughout the world is interconnected with the traffic in women." "In 1992 it was estimated that 85 per cent of the prostitutes in the [Bois de Boulogne] were illegal immigrants ... In recent years immigrant prostitution in France has been increasingly trafficked from South America, particularly Brazil, Ecuador, Peru, and Colombia."

42/ Ibid., p. 307.

43/ Ibid., pp. 307, 308.

44/ Ibid., appendix: Proposed Convention Against Sexual Exploitation, January 1994.

45/ Shirin Aumeeruddy-Cziffra et al. v. Mauritius, Communication No. 35/1978 (9 April 1981), Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XIII.